In The

Supreme Court of the United States

October Term, 1978

No. 78-1661

JAMES RICHARD CECIL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ROBERT S. BERGER
DAVIES AND SAINT-VELTRI
1034 Logan Street
Denver, Colorado 80203
Attorney for Petitioner

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

In The

Supreme Court of the United States

October Term, 1978

—o—

No. .....

—o—

JAMES RICHARD CECIL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

James Richard Cecil, your Petitioner, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above-entitled cause of March 8, 1979.

—o—

OPINIONS BELOW

This cause was decided by a panel of the United States Court of Appeals for the Tenth Circuit on March 8, 1979, in an Opinion which has been designated as not for routine publication. The Opinion is reproduced as Appendix D hereto.

On April 3, 1979, the Court of Appeals denied the Petitioner's Petition for Rehearing and Suggestion of Appropriateness of Rehearing en banc (see Appendices E and F). No opinion was written and the Order has not been officially reported.

—o—

JURISDICTION

The judgment of the United States Court of Appeals was entered on March 8, 1979 (see Appendix D). A timely Petition for Rehearing with Suggestions for Appropriateness of Rehearing en banc was denied on April 3, 1979 (see Appendices E and F).

The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254 (1).

—o—

QUESTION PRESENTED

Does a judgment of acquittal on an indictment charging possession with intent to distribute cocaine in violation of Title 21 U. S. C. § 841 (a) (1) present a Double

Jeopardy bar to a subsequent indictment charging possession with intent to distribute cocaine and distribution of cocaine if both indictments arise from the same transaction.

—o—

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Fifth Amendment.

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual services in time of war or public danger; *nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;* nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

—o—

STATEMENT

The petitioner was arrested on May 11, 1978, at the scene of a transaction involving the sale of cocaine to undercover narcotics agents. He and others were then named in a single count indictment alleging possession with intent to distribute cocaine in violation of Title 21 U. S. C. § 841 (a) (1) (see Appendix A). The petitioner

was acquitted in a separate bench trial. The trial Court's ruling was essentially that although the government had proven a case of aiding and abetting a distribution, it had not proven any element of possession (see Appendix B). Thereafter an indictment was returned alleging in one count both possession with intent to distribute cocaine and distribution of cocaine (see Appendix C). This indictment was based upon the same transaction as that for which the petitioner had already been acquitted. The petitioner filed a Motion to Dismiss raising the obvious Double Jeopardy issue. The trial Court denied the Motion and an immediate Appeal was perfected upon the authority of *Abney v. United States,* 431 U. S. 651 (1977). In an unpublished Opinion a panel of the United States Court of Appeals for the Tenth Circuit affirmed the District Court's denial of the Motion to Dismiss. A Petition for Rehearing was denied and the panel has stayed its mandate pending the disposition of this Petition. The petitioner has not been tried on the second indictment.

---o---

REASONS FOR GRANTING THE WRIT

The Court of Appeals Opinion relied upon the "same evidence" test announced in *Blockburger v. United States,* 284 U. S. 299 (1932). The opinion, however, does not discuss this Honorable Court's recent decision in *Sanabria v. United States,* — U. S. —, 57 L. Ed. 2d 43 (1978). In that decision this Court specifically held that the "same evidence" test does not apply to successive prosecutions arising under Title 18 U. S. C. § 1955, because that test is only used to determine whether a single transaction may give

rise to separate prosecutions, convictions and/or punishments under *separate* statutes. *Sanabria,* supra, at page 57, footnote 24. Petitioner contends that this case falls squarely within the Rule announced in *Sanabria* and that the Opinion here is in conflict with it.

Since the Opinion finds distribution and possession with intent to distribute under § 841 (a) (1) to be separate and distinct crimes, it would necessarily have to condemn as duplictious an indictment naming both offenses in one count and would necessarily permit separate prosecutions, convictions or sentences for violations of § 841 (a) (1) arising from one transaction. The Opinion thus overrules previous decisions of the Tenth Circuit without comment and without recognizing the result of such action. See *United States v. Herbert,* 502 F. 2d 890 (10th Cir., 1974), and *Troutman v. United States,* 100 F. 2d 628 (10th Cir., 1938). This position is also inconsistent with that taken by other Circuits. *United States v. Orzechowski,* 547 F. 2d 978 (7th Cir., 1977); *United States v. Stevens,* 521 F. 2d 334 (6th Cir., 1975); *United States v. Atkinson,* 512 F. 2d 1235 (4th Cir., 1975).

The Opinion purports to partially reverse the trial court's denial of the Motion to Dismiss. Presumably that refers to the portion of the one count indictment alleging possession with intent to distribute. The Opinion fails to indicate how a jury is to be impaneled to try the petitioner on the one count indictment when the petitioner has already been acquitted of at least a portion of that indictment without running afoul of the Double Jeopardy Clause. The trial court cannot eradicate the offensive language as that would be an impermissible amendment of the indictment. It is therefore possible

that this petitioner could be tried for and convicted of the very same offense for which he was previously acquitted. In avoiding the responsibility of providing guidance to the District Court or counsel on this particular point the Opinion fails to accomplish that which is to be expected of an Opinion of an Appellate Court. That failure can only be corrected by this Court granting the Writ and ruling on this issue.

By granting the Writ, this Court will have an opportunity to adopt the "same transaction" test recommended by Justice Brennan. *Ashe v. Swenson*, 397 U. S. 436, 448-460 (1970) (Brennan, J., concurring). The adoption of the "same transaction" test and the abandonment of the "same evidence" test would eliminate the threat to Double Jeopardy principles that has arisen as the permissible unit of prosecution in a criminal transaction has become more and more narrowly defined. This trend invites the problems presented here and more ominously provides the opportunity for Federal prosecutors to totally circumvent the principles of the Double Jeopardy clause.

—o—

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

ROBERT S. BERGER
DAVIES AND SAINT-VELTRI
1034 Logan Street
Denver, Colorado 80203
Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 78-CR-211

UNITED STATES OF AMERICA,
Plaintiff,

vs.

MARCO AURELIO PACIFICI DIAS, JEANETTE M. HORAN, a/k/a Jeanette Fowler, RICHARD EMIL MATTA, LAWRENCE JEFFREY SACKS, JAMES RICHARD CECIL, and AARON LLOYD AINBINDER,
Defendants.

INDICTMENT
21USC 841 (a) (1)
18 USC 2
(Filed May 25, 1978)

The Grand Jury charges that:

On or about May 11, 1978, in the State and District of Colorado, MARCO AURELIO PACIFICI DIAS, JEANETTE M. HORAN, a/k/a Jeanette Fowler, RICHARD EMIL MATTA, LAWRENCE JEFFREY SACKS, JAMES RICHARD CECIL, and AARON LLOYD AINBINDER did knowingly and intentionally possess with the intent to distribute a controlled substance, to wit: approximately 453 grams of cocaine, a Schedule II narcotic, all in violation of Title 21, United States Code, Section 841 (a) (1) and Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ Gayle Scott Patterson, Foreman

JOSEPH F. DOLAN
United States Attorney

By: /s/ Nancy E. Rice
Assistant U. S. Attorney

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 78-CR-211

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JAMES RICHARD CECIL,
Defendant.

FINDINGS OF FACT PURSUANT TO RULE 23 (c)

(Filed September 1, 1978)

At the request of defendant and with the approval of the United States Attorney, this case was tried to the court, and, at the conclusion of the trial, I took the case under advisement and requested briefs. Those briefs have been filed, and the case is ready for me to decide whether the facts prove defendant guilty of the charge made against him.

Defendant is charged with a violation of 21 U. S. C. § 841 (a) (1) and 18 U. S. C. § 2. The charge is that he possessed or aided and abetted the possession of cocaine with intent to distribute it. He is not charged with distribution of cocaine or aiding and abetting its distribution, something I think the evidence showed him to be guilty of beyond a reasonable doubt.

This case is not like *United States v. Herbert,* (1974) 10 Cir., 502 F. 2d 890. Herbert was charged in a one count indictment with *both* possession with intent to distribute *and* distribution. Judge McWilliams said that the indictment was not duplicitous and that as trial judge I

luckily bailed out because I instructed only on possession with intent to distribute. Judge McWilliams said:

> "In thereafter defining the essential elements of the crime the trial court clearly indicated that the defendants no longer were charged with the actual distribution of the marijuana, but only with the possession of marijuana with an intent to distribute."

I think this is clear recognition by the Tenth Circuit that distribution and possession with intent to distribute are separate offenses although both can be charged in a single count. Only one of those two offenses were charged against Cecil in this case, and I think that *United States v. Jackson,* (1976) 5 Cir. 526 F. 2d 1236, is not to be distinguished and that it correctly states the law. Jackson was charged under this very statute with possession with intent to distribute cocaine. The Fifth Circuit held:

> "(Jackson) was improperly indicted under the possession clause of 21 U. S. C. § 841 (a) (1), because although the evidence was sufficient to sustain an aiding and abetting charge of distribution under § 841 (a) (1), it fails to establish Jackson's aiding and abetting possession of the cocaine with intent to distribute."

The evidence in this case demonstrated to my satisfaction beyond a reasonable doubt that Cecil aided and abetted the distribution of cocaine, but that isn't what he was charged with. The evidence did not show guilt of possession—either actual or constructive—or guilt of aiding and abetting possession with intent to distribute.

On the factual record made I must find the defendant "not guilty" of the only charge made against him. I express no opinion as to whether Cecil has or has not been in jeopardy should he be indicted under the other

prong of 21 U. S. C. § 841 (a) (1), and all I do is to make the factual determination that the evidence did not establish Cecil's guilt of the exact charge made against him. I am sure that some would say that this "not guilty" verdict rests on a technicality and perhaps in a sense it does. But it would be a sorry state of affairs if a man could be charged in a one count indictment with murder and be convicted of the uncharged crime of burglary, and that is what the government is asking me to do here and that is why the Fifth Circuit ruled the way it did on quite similar facts in *United States v. Jackson, supra.*

Dated this 1st day of September, 1978.

/s/ Fred M. Winner
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No. 78-CR-306

UNITED STATES OF AMERICA
Plaintiff,

vs.

JAMES RICHARD CECIL,
Defendant.

INDICTMENT

21 U. S. C. §841(a)(1); 18 U. S. C. § 2

(Filed September 13, 1978)

The Grand Jury charges that:

On or about May 11, 1978, in the State and District of Colorado, JAMES RICHARD CECIL did knowingly and intentionally possess with the intent to distribute and distribute a controlled substance, to wit: cocaine, a Scheduled II narcotic, all in violation of Title 21, United States Code, Section 841(a)(1); and Title 18, United States Code, Section 2.

A TRUE BILL:

/s/ Margaret P. Sorey
Foreman

JOSEPH F. DOLAN
United States Attorney

By: /s/ Charles L. Casteel
Assistant United States Attorney

13 September 1978

/s/ Marilyn E. Gingerich

APPENDIX D

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

NO. 78-1919

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JAMES RICHARD CECIL,
Defendant-Appellant.

Appeal from the United States District Court
for the District of Colorado

(D. C. No. 78-CR-306)

(Filed March 8, 1979)

Nancy E. Rice, Assistant United States Attorney (Joseph F. Dolan, United States Attorney, and Charles L. Casteel, Assistant United States Attorney, on the brief) for Plaintiff-Appellee.

Robert S. Berger of Davies and Saint-Veltri, Denver, Colorado, for Defendant-Appellant.

Before McWILLIAMS, DOYLE and McKAY, Circuit Judges.

DOYLE, Circuit Judge.

This is a criminal prosecution in which the defendant-appellant is charged with a violation of 21 U. S. C. § 841(a)(1) and 18 U. S. C. § 2. The indictment charges that on or about May 11, 1978, in the District of Colorado, the defendant did knowingly and intentionally possess

with intent to distribute and distribute a controlled substance, to-wit: cocaine, a Schedule II narcotic, all in violation of 21 U. S. C. § 841(a)(1) and 18 U. S. C. § 2.

The present appeal is from an order denying a motion to dismiss on the ground that the prosecution was barred because of prior jeopardy.

In a prior indictment, which dealt with the same operative facts, the accused was charged with a violation of the same statutes. The charge was that he had aided and abetted the possession of cocaine with intent to distribute.

We gather from the limited information in the record that the evidence did not support this charge in that the defendant could not be shown to have had actual or constructive possession of the narcotic in question. Accordingly, the court entered an order dismissing the indictment. Thereupon, the district attorney filed the present charge, and the instant motion to dismiss was filed following which there was an extensive argument before the trial court, Judge Winner, after which the court rather reluctantly denied the motion.

The question presented is whether this acquittal on the prior charge constitutes a violation of the double jeopardy clause of the Fifth Amendment, which clause prohibits any person being subject to the same offense to be twice put in jeopardy of life or limb. So the issue here is whether or not the offenses, that charged in the first indictment and that which was charged in the indictment now before us, are the same or are separate crimes. Our conclusion is that the offense of distribu-

tion is distinct and therefore the double jeopardy clause of the Fifth Amendment does not apply to it.

The case which is most frequently cited on the instant subject is that of the Supreme Court in *Blockburger v. United States,* 284 U.S. 299 (1932). There the defendant was charged with violating provisions of the Harrison Narcotics Act. There were five counts. The jury returned a verdict against the defendant on the second, third and fifth counts only. Each of these counts charged the sale of morphine hydrochloride to the same purchaser. The second count charged a sale on a specified day of ten grains of the drug not in or from the original stamped package. The third count charged a sale on the following day of eight grains not in or from the original stamped package. The fifth count charged the latter sale also as having been made not in pursuance of a written order of the purchaser as required by the statute. The court sentenced the defendant to five years imprisonment and a fine of $2,000 upon each count, the terms of imprisonment to run consecutively. This judgment was affirmed by the Court of Appeals.

The contentions before the Supreme Court were, first, that the two sales charged in the second and third counts which were made to the same person constituted a single offense. Second, that the sale charged in the third count having been made not from the original stamped package and the identical sale charged in the fifth count as having been made not in pursuance of a written order constituted but one offense for which only a single penalty could be imposed. The Court held that the sales made in the second and third counts, although

made to the same person, were distinct and separate, having been made at different times. These were distince acts and separate crimes even though part of the same general transaction. The fact that each charge required proof of an element not required in the other offenses supported the conclusion that the offenses were distinct. The same is true of the third and fifth counts.

The question is then, whether the offenses in the second indictment are distinct or are the same.

In the case of *United States v. Herbert,* 502 F. 2d 890, 893 (10th Cir. 1974), the problem was one of pleading. The indictment charged the defendant in one count with distributing marijuana and, alternatively, with possessing marijuana with intent to distribute, in violation of § 841(a)(1), the very section with which we are involved in the present case. That section, the count pointed out, sets forth several ways in which the statute may be violated including both distribution and possession with intent to distribute. The court said "Such being the case, it is proper to allege in the conjunctive, without the indictment being duplicitous, *Cordova v. United States,* 303 F. 2d 454 (10th Cir. 1962), and *Troutman v. United States,* 100 F. 2d 628 (10th Cir. 1938)."

As a result of the way the cause was handled, it rather resembles the case at bar, because the trial court ruled that there was insufficient evidence to support the second count and submitted only the possession count to the jury. The court said that there was no evidence of distribution in the record and that the jury was entitled to consider the possession charge with intent to distribute and simple possession as well. So there is a recognition that the two offenses are separate and dis-

tinct, even though they arise from the same statute and even though each offense is part of one factual transaction.

The decision of the Fifth Circuit in *United States v. Jackson,* 526 F. 2d 1236 (5th Cir. 1976), is almost directly in point and supports the government's contention.

The relatively recent decision of the Supreme Court in *Brown v. Ohio,* 432 U. S. 161 (1977) is also supportive. There the defendant was charged with theft of an automobile and also joyriding. It was held that there could not be a prosecution for the crime of stealing an automobile following prosecution for the lesser included offense of operating the same vehicle without the owner's consent. It was said that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not, citing *Blockburger, supra.* The Court went on to say that in line with this test the double jeopardy clause generally forbids successive prosecutions and cumulative punishments for a greater and lesser included offense.

The recent decision of the Supreme Court in *Jeffers v. United States,* 432 U. S. 137, decided in June 1977, also supports the government's theory. There the defendant was charged with a very broad conspiracy to distribute heroin and cocaine during a specific period of time, contrary to § 841 (a) (1). Another count charged petitioner, pursuant to § 841(a)(1), with violating 21 U. S. C. § 848, which prohibits conducting a continuous criminal enterprise to violate the drug laws. The in-

dictment alleged that he had undertaken the distribution in concert with five or more others with respect to whom he occupied the position of organizer and supervisor.

To be sure, in *Jeffers,* the two offenses arose under different statutes. However, we do not see this as a ground for distintion where, as here, the statutory provision defines several different offenses and clearly shows distinct classes. Section 841 declares it to be unlawful to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance. Thus, these are described separate and distinct acts, each of which calls for proof of an additional element and hence constitutes a separate crime or offense.

In the basic indictment which was dismissed it was charged that the defendant did knowingly and intentionally possess with intent to distribute a controlled substance, to-wit: Approximately 453 grams of cocaine. The indictment at bar charges that the defendant did knowingly and intentionally possess with intent to distribute and distribute a controlled substance, to-wit: cocaine, a Schedule II drug, all in violation of 21 U.S.C. § 841(a)(1), and 18 U.S.C. § 2.

The first part of the charge in the present indictment is obviously barred by the acquittal on the charge of knowingly and intentionally possessing with intent to distribute a controlled substance. Thus, the only viable offense which is charged in the present indictment is distributing a controlled substance, to-wit: cocaine. That is, of course, a distinct offense that is provable only by evidence other than that which would have been needed

to prove the possession. What the government had in mind in recharging the offense of possession we will never know.

The judgment of the district court is affirmed in part and reversed in part and remanded for further proceedings.

APPENDIX E

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1919

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES RICHARD CECIL,

Defendant-Appellant.

PETITION FOR REHEARING

COMES NOW the Defendant-Appellant, by and through his attorney, Robert S. Berger of the law firm of Davies and Saint-Veltri, and respectfully petitions this Honorable Court to grant him a rehearing in this matter.

In support of his Petition, the Defendant-Appellant states:

1. The Opinion misapprehends the applicability of the *Blockburger* "same evidence" test to statutory schemes such as 21 U.S.C. §841(a)(1). The *Bell-Prince* line of cases and, most recently, *Sanabria v. United States,* clearly demonstrates that *Blockburger* is not an appropriate test for double-jeopardy in this matter. These Supreme Court cases are not addressed in the Opinion.

2. The Opinion misconstrues the 5th Circuit's position expressed in *United States v. Jackson.* That Opinion merely requires an acquittal when the government fails to prove the allegations of the indictment. It addresses only the issues raised in the trial of the first indictment and does not speak to the issues raised herein by the second indictment.

3. Although the Opinion purports to rely on *Herbert* and *Troutman*, it, in effect, overrules the logic of those decisions. They hold that the reason such indictments are not duplicitious is that such statutes define one crime which can be committed by doing any one of several prohibited acts. The following language from *Troutman* is instructive:

> "An indictment charging a statutory offense must follow the statute creating it; but where the statute denounces several acts as a crime, they may be charged in one indictment on a single count if they are connected in the conjunctive.
>
> "An indictment drawn in that manner is not duplicitous and it suffices to prove any one or more of the charges." 100 F. 2d 628, 631.

The Opinion, by finding that the various acts prohibited in § 841 (a) (1) are separate and distinct offenses, necessarily must then condemn as duplicitous an indictment charging violations of more than one of the acts in a single count.

4. The Opinion fails to instruct the trial court as to the appropriate manner in which to remove the first part of the indictment which is " . . . obviously barred by the acquittal . . . " Since the Court cannot amend the indictment by striking the offending language, how can the indictment be tried without the Defendant being placed in jeopardy again?

5. Defendant-Appellant prays leave of the Court to supplement the record herein to include a transcript of the proceedings at the first trial.

6. The issues raised herein provide this Honorable Court with an unique opportunity to resolve many difficult pleading and evidentiary problems relating to prosecutions under 21 U. S. C. § 841(a)(1) and to address more general double-jeopardy principles. The Appellant therefore would respectfully request that the rehearing be held en banc and that the Opinion be published in order to provide guidance to the trial bench and bar in future matters.

WHEREFORE, Defendant-Appellant prays for the relief requested and for such other and further relief as Court may deem just and proper.

Respectfully submitted,

DAVIES AND SAINT-VELTRI
By /s/ Robert S. Berger by
Joseph Saint-Veltri
Attorney for Defendant-Appellant
1034 Logan Street
Denver, Colorado 80203
Telephone: 832-2312

CERTIFICATE OF SERVICE

I hereby certify that I delivered a true and correct copy of the above and foregoing Petitioner for Rehearing to the Office of the United States Attorney, 323 United States Courthouse, Denver, Colorado, on the 19th day of March, 1979.

/s/ Joseph Saint-Veltri

APPENDIX F

MARCH TERM—APRIL 3, 1979

Before The Honorable Oliver Seth, Circuit Judge
Honorable William J. Holloway, Jr., Circuit Judge
Honorable Robert H. McWilliams, Circuit Judge
Honorable James E. Barrett, Circuit Judge
Honorable William E. Doyle, Circuit Judge
Honorable Monroe G. McKay, Circuit Judge
Honorable James K. Logan, Circuit Judge

No. 78-1919

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

vs.

JAMES RICHARD CECIL,

Defendant-Appellant.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned cause.

Upon consideration whereof, the petition for rehearing is denied by Circuit Judges McWilliams, Doyle, McKay, to whom the case was argued and submitted.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

/s/ Howard K. Phillips, Clerk

No. 78-1661

In the Supreme Court of the United States

OCTOBER TERM, 1978

JAMES RICHARD CECIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BROWN
Attorney
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1661

JAMES RICHARD CECIL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 6-12) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1979. A petition for rehearing was denied on April 3, 1979. The petition for a writ of certiorari was filed on May 2, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Double Jeopardy Clause bars the prosecution of petitioner on a charge of distributing

cocaine, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2, after his acquittal on a charge of possessing the cocaine with intent to distribute it.

STATUTES INVOLVED

18 U.S.C. 2(a) provides:

> Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

21 U.S.C. 841(a)(1) provides:

> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

STATEMENT

On May 11, 1978, petitioner was arrested at the scene of a transaction involving the sale of cocaine to undercover narcotics agents (Pet. 3). In the initial indictment arising out of that incident, petitioner was charged with having possessed cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 1). Following a non-jury trial in the United States District Court for the District of Colorado, petitioner was acquitted of that charge. The district court stated that the evidence showed that petitioner aided and abetted the cocaine distribution but that it "did not show guilt of possession—either actual or constructive—or guilt of aiding and abetting possession with intent to distribute" (Pet. App. 3). The court pointed out that the acquittal was necessitated by the limited nature of the charge set forth in the indictment, although it had been

demonstrated beyond a reasonable doubt that petitioner had aided and abetted the distribution of cocaine, in violation of Section 841(a)(1). The court stated (Pet. App. 2-3):

> [Petitioner] is not charged with distribution of cocaine or aiding and abetting its distribution, something I think the evidence showed him to be guilty of beyond a reasonable doubt.
>
> * * * * *
>
> The evidence in this case demonstrated to my satisfaction beyond a reasonable doubt that [petitioner] aided and abetted the distribution of cocaine, but that isn't what he was charged with.

Two weeks later a second indictment was returned against petitioner, charging in one count that he both possessed the cocaine with intent to distribute it, and that he distributed it, in violation of 21 U.S.C. 841(a)(1) and 18 U.S.C. 2 (Pet. App. 5). Prior to trial on this indictment, petitioner moved to dismiss the prosecution on double jeopardy grounds. The district court denied the motion, and petitioner appealed. See *Abney* v. *United States*, 431 U.S. 651 (1977). The court of appeals affirmed the district court's ruling in part and reversed in part, holding that while "[t]he first part of the charge in the present indictment [possession of cocaine with intent to distribute it] is obviously barred" by the prior acquittal, the offense of distribution is not barred (Pet. App. 11). That portion of the indictment charges a separate and distinct crime, the court held, and trial on that charge would not violate the Double Jeopardy Clause (*ibid.*).

ARGUMENT

1. Petitioner contends (Pet. 4-6) that the instant prosecution for distribution of cocaine is barred by the

Double Jeopardy Clause in view of his prior acquittal of possession of cocaine with intent to distribute it. The court of appeals correctly rejected that contention because possession of cocaine with intent to distribute it and distribution of cocaine are separate offenses, and because under the somewhat unusual circumstances of this case, petitioner's acquittal on the possession charge created no collateral estoppel consequences in the subsequent prosecution for aiding and abetting the distribution of cocaine.

The Double Jeopardy Clause does not ordinarily bar separate punishments or successive prosecutions for separate and distinct offenses, even when they arise out of a related course of conduct. See *Brown* v. *Ohio*, 432 U.S. 161, 164-169 (1977). The principal test for determining whether given conduct constitutes two offenses for double jeopardy purposes was stated in *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932); it is satisfied "[i]f each [offense] requires proof of a fact that the other does not, * * * notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli* v. *United States*, 420 U.S. 770, 785 n.17 (1975).

The offenses involved in this case meet that test. A charge of possession with intent to distribute requires proof of actual or constructive possession but does not require proof of actual distribution. A charge of distribution requires proof of actual distribution but does not require proof of actual or constructive possession. Thus, a person can be guilty of distributing a controlled substance by aiding and abetting those directly involved in the transaction (and be thus punishable as a principal under 18 U.S.C. 2) without having actual or constructive possession of the controlled substances. And most courts of appeals have held that possession with intent to distribute and distribution are separate offenses that may

be separately charged. *United States* v. *Henciar*, 568 F. 2d 489 (6th Cir. 1977), cert. denied, 435 U.S. 953 (1978); *United States* v. *Oropeza*, 564 F. 2d 316, 323-324 (9th Cir. 1977), cert. denied, 434 U.S. 1080 (1978); *United States* v. *Jackson*, 526 F. 2d 1236 (5th Cir. 1976); *United States* v. *Stevens*, 521 F. 2d 334, 337 n.2 (6th Cir. 1975).

Usually, the evidence of distribution will also show possession with intent to distribute—*e.g.*, where the evidence simply shows a sale of a controlled substance by the defendant. In those circumstances, where the evidence merely shows that the possession ripened into the distribution, the courts of appeals have applied the rule of lenity set forth in such cases as *Prince* v. *United States*, 352 U.S. 322 (1957), to prohibit multiple punishments for the two offenses, although recognizing them to be separate offenses. *United States* v. *Hernandez*, 591 F. 2d 1019 (5th Cir. 1979); *United States* v. *Henciar, supra*; *United States* v. *Oropeza, supra*; *United States* v. *Olivas*, 558 F. 2d 1366, 1368 (10th Cir.), cert. denied, 434 U.S. 866 (1977); *United States* v. *Stevens, supra*; *United States* v. *Atkinson*, 512 F. 2d 1235 (4th Cir. 1975); *United States* v. *Curry*, 512 F. 2d 1299 (4th Cir.), cert. denied, 423 U.S. 832 (1975).[1] Further, in such circumstances, an acquittal

---

[1]Petitioner is incorrect in contending (Pet. 5) that the decision below is inconsistent with *United States* v. *Stevens, supra*, and *United States* v. *Atkinson, supra*. Those cases simply held that where the evidence showing distribution was the same as the evidence showing possession, the offenses merged and the rule of lenity precluded separate punishment. Both decisions stressed the nature of the evidence, and *Stevens* expressly recognized that the offenses were separate. See 512 F. 2d at 1240; 521 F. 2d at 337 n.2.

Petitioner is correct that the Seventh Circuit in *United States* v. *Orzechowski*, 547 F. 2d 978 (1976), and a prior decision of the Tenth Circuit, *United States* v. *Herbert*, 502 F. 2d 890 (1974), held that it is not duplicitous to charge possession and distribution in the same count. In those cases, however, the evidence of possession and of distribution was the same and there was thus little risk that a general verdict on the count would have reflected divided opinions among the

on a charge of possession will in all likelihood create a collateral estoppel bar to a subsequent prosecution for distribution. See *Brown* v. *Ohio*, *supra*, 432 U.S. at 166-167 n.6; *Ashe* v. *Swenson*, 397 U.S. 436 (1970).

Neither the rule of lenity nor principles of collateral estoppel, however, bar a subsequent prosecution for distribution where the evidence of distribution does not also show the defendant's possession with intent to distribute and where it is clear that the acquittal on a charge of possessing the drugs in question was not based on a factual determination inconsistent with a determination that the defendant aided and abetted the distribution. In this case there is no question that the acquittal on the possession charge was based on a determination consistent with a finding that petitioner was guilty of distribution, because the factfinder expressly so stated when it acquitted petitioner on the possession charge. See page 3, *supra*. Because the offenses are separate and because on the facts of this case there is no collateral estoppel bar to the second prosecution, the court of appeals properly rejected petitioner's double jeopardy claim.[2]

---

jury as to the offenses shown by the evidence, which is the risk that the duplicity rule is designed to avoid. It is not clear whether those courts concluded that possession and distribution could never be regarded as separate offenses.

[2]Petitioner erroneously relies (Pet. 4-5) on *Sanabria* v. *United States*, 437 U.S. 54 (1978), for the proposition that one statute cannot establish separate offenses for Double Jeopardy purposes. *Sanabria* suggested no such proposition. In that case, the Court held that the allowable unit of prosecution under 18 U.S.C. 1955 was conducting an "illegal gambling business," and that the offense could not be divided into multiple offenses for each of the different types of gambling conducted by the business. 437 U.S. at 69-74. But the relevant question is identification of the allowable unit of prosecution that Congress intended to establish. It is immaterial whether

This is one of a relatively small class of cases in which the prosecutor initially misapprehends the legal consequences of the facts that will be proved at trial or misconstrues the legal implications of the statute under which a criminal charge is first brought, with the result that the first trial is terminated in the defendant's favor, and the conduct is made the subject of a second indictment charging the correct offense. While such mistakes by the prosecutor are regrettable, the courts have concluded that there is no double jeopardy bar to the second prosecution in such circumstances unless dictated by principles of res judicata or collateral estoppel. See, *e.g.*, *United States* v. *Kehoe*, 579 F. 2d 971 (5th Cir. 1978), cert. denied, Nos. 78-802 and 78-803 (Feb. 21, 1979); *United States* v. *Shelton*, 573 F. 2d 917 (6th Cir.), cert. denied, No. 77-1664 (Oct. 2, 1978); cf. *Lee* v. *United States*, 432 U.S. 23 (1977). Since, as shown above, the reprosecution of petitioner is barred neither by res judicata (the present charge being a legally distinct offense) nor by collateral estoppel, there is no occasion for further review in this case.[3]

Congress has used one or more statutes, or sections, or subsections, to establish different permissible units. The Internal Revenue Code may be said to be a "single statute", but it describes many distinct offenses. Thus, in the footnote on which petitioner relies (437 U.S. at 70 n.24), the Court in *Sanabria* distinguished that case from "decisions permitting prosecution under statutes defining as the criminal offense a discrete act, after a prior conviction or acquittal of a distinguishable discrete act that is a separate violation of the statute." As we have noted, most courts of appeals have held that possession with intent to distribute and distribution are distinguishable discrete acts under 21 U.S.C. 841(a)(1).

[3]If the Double Jeopardy Clause were construed to bar a retrial on a proper charge after a first trial under an incorrect charge, the benefits to the relatively few defendants in petitioner's position would be considerably outweighed by the effect of such a rule in prompting prosecutors to include in the initial indictment a larger number of

2. Petitioner also urges (Pet. 6) that the instant prosecution should be barred because the Double Jeopardy Clause requires the prosecution in one proceeding of "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." See *Ashe* v. *Swenson, supra,* 397 U.S. at 453-454 (Brennan, J., concurring). This broad view of the Double Jeopardy Clause, however, has never been accepted by this Court. See *Brown* v. *Ohio, supra,* 432 U.S. at 166-167 & n.6.

3. Although recognizing that the court of appeals has barred retrial on that portion of the second indictment that refers to the possession offense of which he was previously acquitted, petitioner argues that trial on the distribution portion of the offense alone would constitute an impermissible amendment of the indictment (Pet. 5-6). That contention is incorrect. An indictment is not amended when the court withdraws a portion of it from the jury's consideration and submits the case to the jury on what remains. See *Salinger* v. *United States,* 272 U.S. 542 (1926); *United States* v. *Prior,* 546 F. 2d 1254, 1257 (5th Cir. 1977) (collecting cases). In any case, this issue is not appropriately presented for review at this time. This claim is not founded upon the Double Jeopardy Clause and thus does not implicate any requirement for pretrial

---

charges than would otherwise be deemed necessary in order to guard against the consequences of a mistake—a practice that, while constitutionally unassailable, would work to the detriment of large numbers of defendants.

We further note that in cases like the present one, where a second trial is to be had for offenses arising out of the same transaction as was the subject of the first trial, the need for the propriety of a second trial is reviewed by the Department under its "*Petite* policy." In the present case, the Assistant Attorney General has authorized the prosecution of petitioner for aiding and abetting the distribution of narcotics.

review. Cf. *Abney* v. *United States, supra.* If petitioner is convicted on the distribution portion of the indictment, he may raise at that time any objection to the district court's handling of the indictment as well as any other allegation of trial error. Cf. *Cobbledick* v. *United States,* 309 U.S. 323 (1940).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

WILLIAM C. BROWN
Attorney

JULY 1979

DOJ-1979-07